

2. If so, should this claim be dismissed for lack of prosecution, pursuant to K.S.A. 2012 Supp. 44-523(f)(2)?

FINDINGS OF FACT

This is the second time this claim has been before the Board. The facts and procedural history material to the issues now before the Board follow.

Following a preliminary hearing, by Order dated October 14, 2013, the ALJ found claimant failed to prove she sustained personal injury by accident arising out of and in the course of her employment and denied claimant's request for medical treatment. Claimant requested Board review of the preliminary hearing Order. On January 30, 2014, one Board Member affirmed the ALJ's preliminary decision.

On November 14, 2014, respondent filed a motion to dismiss for lack of prosecution pursuant to K.S.A. 2012 Supp. 44-523(f)(2), alleging the claim failed to proceed to regular hearing within one year from the ALJ's preliminary award denying compensation.

Respondent's motion to dismiss was heard by the ALJ on December 10, 2014, and April 20, 2015. By Order dated April 21, 2015, the ALJ denied respondent's motion to dismiss because claimant proved a good faith reason for the delay in proceeding to regular hearing.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-523(f)(2) provides:

In any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability of the claim, the employer shall be permitted to file with the division an application for dismissal based on lack of prosecution. The matter shall be set for hearing with notice to the claimant's attorney, if the claimant is represented, or to the claimant's last known address. Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund pursuant to subsection (b) of K.S.A. 44-534a, and amendments thereto.

Not every decision of an ALJ is subject to Board review. The Board has authority to review preliminary hearing orders under the circumstances specified in K.S.A. 2012 Supp. 44-534a(a)(2) and K.S.A. 2012 Supp. 44-551(i)(2)(A). But, the ALJ's Order denying respondent's motion to dismiss is not a preliminary hearing order.

Pursuant to K.S.A. 2012 Supp. 44-551(i)(1), “[a]ll **final** orders, awards, modifications of awards . . . shall be subject to review by the board upon written request by any interested party within 10 days.” (emphasis supplied) The Order denying respondent’s motion to dismiss was not final, but was interlocutory in nature. Had the ALJ dismissed the claim for lack of prosecution, then a final order would have resulted and the Board would have jurisdiction to review the Order.¹

Denials of motions to dismiss are interlocutory and are not subject to review by the Board.² When the record reveals a lack of jurisdiction, the Board’s authority extends no further than to dismiss the action.³

The Board’s order in *Hoffman*⁴ is consistent with the decision in this claim. The basis for the Board’s jurisdiction in *Hoffman* was the ALJ’s order was a preliminary hearing order that was subject to Board review under the “certain defenses” provision in K.S.A. 44-534a(a)(2).

CONCLUSIONS

1. Respondent’s application for Board review is dismissed for lack of jurisdiction.
2. Accordingly, the merits of the ALJ’s April 21, 2015, Order will not be reviewed by the Board at this time.

DECISION

WHEREFORE, the Board finds the respondent’s application for Board review of the April 21, 2015, Order of Administrative Law Judge Kenneth J. Hursh is dismissed for lack of jurisdiction.

¹ *Carrillo v. Sabor Latin Bar & Grille*, No. 1,045,179, 2014 WL 5798458 (Kan. WCAB Oct. 24, 2014); *cf. Salama v. Hen House Market*, No. 1,009,525, 2008 WL 2673163 (Kan. WCAB June 30, 2008).

² *Walker v. State of Kansas*, No. 1,048,030, 2013 WL 485696 (Kan. WCAB Jan. 25, 2013); *Stupasky v. Hallmark Marketing Corp.*, No. 1,031,988, 2012 WL 1142954 (Kan. WCAB Mar. 14, 2012); *Pham v. Dold Foods, Inc.*, Nos. 1,013,951 & 1,013,952, 2011 WL 6122903 (Kan. WCAB Nov. 22, 2011).

³ *Berumen v. U.S.D. 233*, No. 1,067,401, 2014 WL 6863036 (Kan. WCAB Nov. 7, 2014).

⁴ *Hoffman v. Dental Central, P.A.* No. 1,058,645, 2015 WL 4071473 (Kan. WCAB June 26, 2015).

IT IS SO ORDERED.

Dated this _____ day of July, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
llivengood@markandburkhead.com
kmark@markandburkhead.com

Thomas D. Billam, Attorney for Respondent and its Insurance Carrier
tbillam@wallacesaunders.com
realy@wallacesaunders.com

Honorable Kenneth J. Hursh, Administrative Law Judge